SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 15, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1393 The People of the State of New York, Respondent, Ind. 2791/06

-against-

Saeed Ahmed,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Kerry Elgarten of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert H. Straus, J. at hearing; Edwin Torres, J. at jury trial), rendered July 18, 2007, convicting defendant of three counts of promoting prostitution in the third degree, and sentencing him to an aggregate term of 5 years' probation with community service, unanimously affirmed.

Defendant's principal contention is that the evidence was legally insufficient to establish his guilt of promoting prostitution in the third degree. Ken Franzblau testified for the prosecution in his capacity as an employee of Equality Now,

an advocacy group that researches and investigates possible instances of human trafficking, organized prostitution and sex tourism. Ads for enterprises engaging in these activities are posted on craigslist and other Web sites.

Franzblau found one such posting by an entity called JumpOff Destinations that arranged for wild party tours to the Dominican Republic, where "anything goes." JumpOff's Web site described package tours including travel, lodging and meals, and featured photos of women in various states of undress. The site also indicated that other photos, which were "too hot" for Internet display, could be obtained by e-mail. Using the pseudonym "Dan Maginn," Franzblau began e-mail correspondence with defendant, who identified himself as "Saaed A.," JumpOff's "customer care representative."

In ensuing correspondence, defendant assured Franzblau that he could provide him with as many women as he could handle, and that there would be enough women for all the men on the tour, adding that the price for the women was not included in the tour package and would have to be paid out of pocket. Defendant informed Franzblau that he procured the women by telephoning them prior to each tour's departure. According to defendant's terms, payment for the tour would have to be made to "Saeed Ahmed/JumpOff Destinations."

In a telephone conversation recorded by the District Attorney's Office, Franzblau discussed tour packages with defendant and made arrangements for a $1,700 tour. Thereafter, an undercover detective visited defendant at his apartment under the pretext of booking such a trip to the Dominican Republic. The detective signed an agreement for four package tours at a price of $6,800, but never made payment or traveled to the Dominican Republic. Police officers subsequently executed a search warrant at defendant's apartment. The items seized included invoices with notations for "Dan Maginn" as well as other customers. In addition, the police recovered a contract with another customer who will be hereinafter referred to as "A.E."

In a post-arrest videotaped statement, defendant admitted to being contacted by A.E. via e-mail. Defendant stated that he met A.E. in the Dominican Republic, where the customer paid $1,550 for the tour package. Defendant admitted to providing A.E. with two women during the three-day trip. Records obtained from American Airlines confirmed that defendant had flown from New York to Santiago, Dominican Republic, on March 29, 2006. The airline's records also confirmed that A.E. flew from New York to Santiago on April 6, and returned to New York on April 9.

Defendant's challenge to the legal sufficiency of the

evidence is based upon the lack of proof that he employed prostitutes or owned or managed a place of prostitution. Accordingly, defendant argues that his conviction should be reduced to the lesser charge of promoting prostitution in the fourth degree, which simply involves advancing or profiting from prostitution (Penal Law § 230.20), without any control or ownership of a business or enterprise. On the other hand, "A person is guilty of promoting prostitution in the third degree when he knowingly: 1. Advances or profits from prostitution by managing, supervising, controlling or owning . . . a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes" (§ 230.25).

Four months after defendant's conviction, § 230.25(1) was amended to expressly include as proscribed conduct the advancement or profiting from prostitution by managing, supervising, controlling or owning "a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute" (L 2007, ch 74, § 1). Needless to say, defendant was not prosecuted under the statute as amended. Citing the amendment, defendant argues that his conduct, which involved travel-related services, did not come with the ambit of the pre-amended statute. This argument is unpersuasive because it is

refuted by legislative history. The Senate Memorandum in Support of the amendment summarizes that "Section 1 of the bill amends Penal Law § 230.25 to *clarify* that someone who sells travel services to prostitution tourists may be found guilty of third-degree promoting prostitution, a class D felony" (2 McKinney's 2007 Session Laws of NY, at 1601, emphasis added). Nothing in the pre-amended statute lends itself to a construction that would have excluded a travel-related enterprise from its coverage. The evidence was thus legally sufficient to prove that defendant managed and controlled "a prostitution business or enterprise involving prostitution activity by two or more prostitutes" within the meaning of § 230.25.

We also reject defendant's argument that *People v Barabash* (35 AD3d 873 [2006]) is controlling. The defendants in *Barabash* ran a tourism business that provided trips to the Philippines and procured "tour guides" who took customers to locations where prostitutes were available, and paid the prostitutes on behalf of the customers. Without elaboration, the Court affirmed the dismissal of a count alleging promoting prostitution in the third degree, finding simply that the evidence before the grand jury "was not legally sufficient to establish that the defendant managed, supervised, controlled, or owned a prostitution enterprise" (*id.* at 874). Here, by contrast, the evidence

established that defendant did not engage the prostitutes through intermediaries. As part of his enterprise, defendant himself acted as the direct link between A.E. and the two prostitutes he procured.

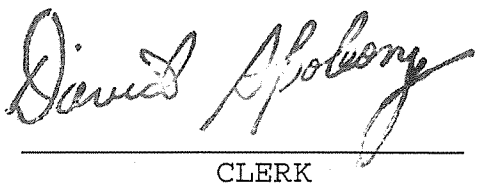
Defendant's suppression motion was properly denied. Defendant was arrested in the hallway outside his apartment when the search warrant was executed. On that basis, he argues that his right to counsel under *People v Harris* (77 NY2d 434 [1991]) was illegally circumvented because the police chose to apply for a search warrant rather than an arrest warrant. This argument is also unavailing. There is no constitutional right to be arrested, and the police are not required to stop an investigation at the first indication of probable cause for an arrest (*People v Keller*, 148 AD2d 958, 960 [1989], *lv denied* 73 NY2d 1017 [1989]).

The testimony, photographs and prosecutorial remarks challenged by defendant as inflammatory and prejudicial were permissible within the context of the trial and did not deprive him of a fair trial. Defendant's remaining contention is

unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010



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Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1742-
1742A Eddie Garcia, Index 18784/91
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents.

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 22, 2009, dismissing the complaint, affirmed, without costs. Appeal from order, same court and Justice, entered June 10, 2008, which denied plaintiff's motion to renew his motion to restore the action to the trial calendar, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, who seeks damages in connection with alleged police misconduct, filed his note of issue in 1996. A pre-trial conference was scheduled for July 20, 1998. Plaintiff asserts that his attorneys never received notice of the conference and failed to appear for it. As a result, the court struck the case from the trial calendar. On July 13, 1999, plaintiff moved by

order to show cause to restore the case to the calendar. Defendant did not oppose the motion. On August 24, 1999, the court denied the motion because the papers submitted to the court apparently did not contain a copy of proof of service on defendants. However, the denial was made "with leave to renew upon proper papers."

Plaintiff claims that his attorneys never received the order provisionally denying his motion to restore. Nevertheless, plaintiff and his attorneys apparently made no effort to follow up on the status of the motion. Rather, they allowed over eight years to elapse. Then, on November 7, 2007, they moved to renew the original motion pursuant to the "leave" granted in the order of August 24, 1999. The court denied the motion. It applied the standard applicable when a plaintiff, having had its complaint marked off the trial calendar, fails, pursuant to CPLR 3404, to restore the case within one year from its striking. Under such circumstances, the court held, the plaintiff must establish that the action has merit; that a reasonable excuse exists for the delay in restoring the case; that there was no intent to abandon the action; and that the defendant has suffered no prejudice. The motion court held that plaintiff failed to satisfy this standard.

Plaintiff argues that the court erred by treating his

application to restore as having been made more than one year after the action was marked off. He claims that the court should have focused not on the "renewal" motion made in 2007, but rather on the original motion made in 1999, which unquestionably was made within the one-year period allowed by CPLR 3404. Plaintiff's foundation for this contention is that, because the original order denying his motion to restore contained no deadline by which he was required to "renew upon proper papers," his time to do so did not begin to run until 30 days after he or defendant served a copy of that order with notice of entry. Since no notice of entry was ever served, plaintiff contends, his time to renew never began to run. Plaintiff also relies on cases where a party successfully moved to reargue or renew an order (*Zhi Fang Shi v Sanchez*, 36 AD3d 486 [2007]), or appeal it (*Nagin v Long Is. Sav. Bank*, 94 AD2d 710 [1983]), more than 30 days after the order was issued, because it was never served with notice of entry.

Plaintiff's arguments are without merit. While a party's time to move to renew or reargue an order pursuant to CPLR 2221 does not begin to run until it is served with notice of entry of the order (*see Luming Café v Birman*, 125 AD2d 180 [1986]), the application which plaintiff made in 2007 was not such a motion. Plaintiff's motion was not "based upon matters of fact or law

allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]). Nor was it "based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]). Rather, the 2007 motion was an attempt to correct an error in the 1999 papers for which plaintiff admits he was responsible. The CPLR has no clear rule to apply to the situation where a plaintiff makes a timely motion to restore pursuant to CPLR 3404, but is instructed by the court, after the one-year deadline has passed, to resubmit the papers. However, it is clear that the plaintiff in this situation should have to act diligently to timely rectify his or her error.

Here, plaintiff does not state when he first realized that the 1999 motion to restore had been denied. Even if we were to assume that plaintiff only learned of the 1999 denial shortly before he made his motion to renew in 2007, that is not sufficient. Clearly, plaintiff had a duty to inquire into the status of the 1999 motion. Instead, he sat on his hands for eight years, and offers no explanation as to why he waited so long. Accordingly, the 2007 motion was barred by the doctrine of laches (*see Feldman v New York City Tr. Auth.*, 171 AD2d 473, 474 [1991]). Plaintiff's reliance on *Maragos v Getty Petroleum Corp.* (303 AD2d 652 [2003]), is unavailing. In that case, the timely

motion to restore was denied with leave to renew after the expiration of a 30-day stay imposed upon the withdrawal of plaintiffs' counsel. Supreme Court denied the renewed motion, as it was made over one year after the action was initially marked off. The Second Department reversed, because the plaintiffs "complied with the Supreme Court's order and *promptly* moved to restore the action upon the expiration of the 30-day stay" (303 AD2d at 653 [emphasis supplied]). Here, the renewed motion was not prompt.

The dissent's position is based on the assumption that, with respect to the disposition of the motion to restore, defendant was the "prevailing party." That assumption is inaccurate, as demonstrated by the holding in *Lyons v Butler* (134 AD2d 576 [1987]). In that case, the defendants moved to dismiss the complaint for failure to prosecute and the plaintiffs cross-moved for additional time to file a reply to counterclaims and to complete discovery. The court denied the main motion and granted the plaintiffs' cross motion on the condition that the plaintiffs meet certain deadlines. The plaintiffs failed to comply with the order, and later moved to cure their default. The plaintiffs claimed that they never learned of the order and that they had no obligation to comply with it until they were served with a copy of it by the defendants. The Second Department affirmed the

denial of plaintiffs' motion, stating:

> "Where the rights of a party are or may be affected by an order, the successful moving party, in order to give validity to the order, is required to serve it on the adverse party. However, service of an order on a successful moving party is not necessary since such party is chargeable with knowledge of the order. Consequently, when an order grants the requested relief to a party upon compliance with a condition, such party must at his peril take notice of the order without waiting to be served with a copy of it and must comply with the terms within the proper time or lose the benefit of the order" (134 AD2d at 577, [internal citations omitted]).

The only distinction between *Lyons* and the instant case is that here plaintiff's motion was conditionally "denied" whereas the motion in *Lyons* was conditionally granted. This is a distinction without a difference. As plaintiff states, and defendant does not dispute, the original motion to restore was but a formality, as it was brought within one year of the striking of the case from the trial calendar (*see Johnson v Rivera*, 10 AD3d 288, 289 [2004]). Moreover, it was unopposed, a fact noted by the court in its decision denying the 1999 motion. By denying the motion without prejudice, the court effectively signaled to plaintiff that the motion would be granted if he simply filed an affidavit of service. Indeed, because plaintiff was seeking to have the case restored as of right, he had every reason to rectify his error and comply with the order. Of

course, the City could have ensured that plaintiff had notice of the order by serving a copy on him. However, by failing to "take notice of the order without waiting to be served with a copy of it," plaintiff "los[t] the benefit of" it (*Lyons*, 134 AD3d at 577).

Under these circumstances, to deem plaintiff's 2007 motion as relating back, for timeliness purposes, to the 1999 motion to restore, would be improper. Accordingly, the motion court appropriately applied the standard used where a motion to restore is made more than one year after a case is marked off the calendar. Since plaintiff failed to show a lack of intent to abandon the action and a reasonable excuse for his delay, the 2007 motion was properly denied (*see Katz v Robinson Silverman Pearce Aronsohn & Berman*, 277 AD2d 70, 74 [2000]).

All concur except Saxe and Acosta, JJ. who dissent in a memorandum by Acosta, J. as follows:

ACOSTA, J. (dissenting)

Since plaintiff's motion to renew was timely, and since defendants concede that plaintiff offered a valid excuse for not appearing at the pretrial conference, the motion to renew should have been granted and the action restored to the calendar. Accordingly, I respectfully dissent.

Plaintiff alleges that in 1991 he was falsely arrested and assaulted by police officers in front of 562 West 175th Street. According to plaintiff, he was so severely beaten by police officers that he sustained fractures to his left arm and head and face injures. Discovery was taken and, in 1996, plaintiff filed a notice of issue.

It is undisputed that after plaintiff filed his note of issue, the matter was scheduled for a pre-trial conference on July 20, 1998. Plaintiff, who alleges that he was never given notice of the conference (an allegation which defendant does not dispute), did not appear and the action was dismissed. Neither party ever served this order with notice of entry.

By order to show cause, dated July 13, 1999 - less than one year after the action was dismissed - plaintiff moved to vacate the dismissal and restore the action to the trial calender. The order to show cause was unopposed by defendants.

By order dated August 18, 1999, the application was denied

without prejudice and with leave to renew upon proper papers "including proof of service of the Order to Show Cause and supporting papers." Significantly, defendants have never disputed that the order to show cause was served by certified mail or that it was received. Again, neither party served this order with notice of entry.

On November 7, 2007, some eight years later, plaintiff moved to renew the application to restore the action, arguing that the renewal motion was timely since the August 18, 1999 order denying his order to show cause had not been served with notice of entry. On June 4, 2008, Supreme Court denied plaintiff's motion to renew finding that plaintiff "is taking advantage of the fact that, as the moving party, he never entered the above order," and applied the standard put forth in CPLR 3404 for actions marked off the calendar and not restored within one year. In so doing, the court also found that plaintiff had failed to rebut the presumption of abandonment of the action as mandated by the statute. Plaintiff timely filed a notice of appeal from that order, and a judgment dismissing the complaint was entered on April 22, 2009.

Plaintiff argues on appeal that because no party was ever served with notice of entry of the order denying his motion to

restore, his time for bringing his application to renew[1] his motion to restore never began to run and is therefore timely. Defendant City never directly addresses this argument. Rather, it argues that as plaintiff's motion to renew was made some eight years after the application to restore was denied, he must satisfy the four-step test laid out in CPLR 3404. I disagree.[2]

Initially, it was error for Supreme Court to deny plaintiff's motion to restore the action to the calendar. Plaintiff's motion was made within a year after it was dismissed from the calendar, and as such, "plaintiff only had to request restoration . . . without any obstacles to hurdle" (*Johnson v Rivera*, 10 AD3d 288, 288-289 [2004], [internal quotation marks and citations ommitted]; *see also Basetti v Nour*, 287 AD2d 126, 135 [2001] ("the plaintiffs needed only to request the restoration within one year of the 'off' marking")).

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[1]Throughout his papers, plaintiff calls his motion a motion to renew. However, even plaintiff appears to acknowledge that he is subject to the time limitations of a motion to reargue. That is, that a motion to reargue must be brought within the same time period of a notice of appeal (30 days from service of notice of entry of the order).

[2] As plaintiff's appeal is from a final judgment of dismissal, it brings up for review both the original 1998 order of dismissal and the 2008 order denying his application to renew his motion to restore. As such, both his motion to renew and his direct appeal are timely and must be considered on the merits. Contrary to the City's contention, this is not an appeal from a post-judgment order denying vacatur of a previously entered judgment.

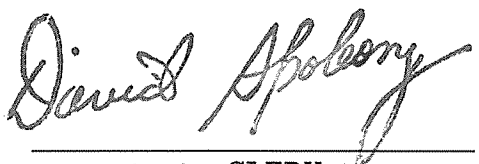
While it is odd that plaintiff would wait some eight years before moving to restore his action, I believe based on the facts of this case he is entitled to do so. It was error for Supreme Court to deem plaintiff's action as one marked off the calendar and not restored within one year. Despite the time lag, plaintiff's time to renew his first application had not begun to run. That is, no notice of entry was ever served (*see Zhi Fang Shi v Sanchez*, 36 AD3d 486 [2007] (first motion order was not served with notice of entry, and as such the time to appeal the first order had not yet run, and the second motion was timely); *see also* CPLR 5513[a] ("An appeal as of right must be taken within thirty days after service by a party upon the appellant of the copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof").

I do not believe that it was plaintiff's burden to serve the order with notice of entry. In fact, it is often the prevailing party that is expected to serve an order with notice of entry. "The time to take an appeal of right is 30 days. The period starts when the winner (destined to be the respondent on appeal) serves on the loser (the appellant) a copy of the objectionable judgment or order with notice of its entry" (Siegel, Practice

Commentaries, McKinney's Cons Laws of N Y, Book 7B, CPLR C5513:2 at 171; *see also Dobess Realty Corp. v City of New York*, 79 AD2d 348, 352 [1981], *appeal dismissed* 53 NY2d 1054 [1981] [the rule requiring service of an order by the prevailing party "enables the [losing] party to see and apprehend his precise condition in reference to the subject. And on the other hand, it leaves the prevailing party at full liberty to set the thirty days a running when he pleases, or to acquiesce in or allow an unlimited time within which to appeal, if he choose to do so"] [*quoting Fry v Bennett*, 16 How Prac 402 (1858)]). My position, however, is not based, as the majority suggests, on the assumption that defendant was the prevailing party. Rather, it is based on the fact that any party can serve the notice of entry, and it is then, and only then, that the clock begins to run. Accordingly, I would reverse.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010



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Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2253 Jay Mitchell Bauman, M.D., Index 102293/08
Plaintiff-Appellant-Respondent,

-against-

The Mount Sinai Hospital, et al.,
Defendants-Respondents-Appellants.

Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for appellant-respondent.

Edwards Angell Palmer & Dodge LLP, New York (David R. Marshall of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered September 26, 2008, which, in an action alleging unlawful discrimination and retaliatory discharge, granted so much of defendants' motion as sought to dismiss the complaint on res judicata grounds and denied that portion of the motion seeking an award of costs and attorneys' fees, unanimously modified, on the law, the motion to dismiss denied and the complaint reinstated, and otherwise affirmed, without costs.

This is one of a series of proceedings that plaintiff, an obstetrician and gynecologist, has brought in connection with the suspension of his staff privileges at the defendant hospital for, among other things, allegedly misusing labor-inducing drugs on patients, and his subsequent termination from the medical staff for, among other things, violating a stipulation that had

partially lifted his suspension. In 2005, plaintiff brought an action for money damages against defendants and others in the Southern District of New York, alleging federal claims for violation of the Health Care Quality Improvement Act of 1986 (42 USC § 11101 *et seq.*) and the Racketeer Influenced and Corrupt Organizations Act (18 USC §§ 1341, 1343 and 1347), as well as state common-law claims for defamation and fraud.[3] The federal court dismissed the action on alternative grounds. First, the court applied the doctrine of primary jurisdiction and held that plaintiff first should have presented his claims, which involved reviewing medical data, to the New York City Public Health Council (PHC) because of its expertise in that area (*Bauman v Mount Sinai Hosp.*, 452 F Supp 2d 490, 499-501 [SD NY 2006]).[4] Second, the court, after reviewing the factual allegations in the

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[3]In July 2005, plaintiff brought an Article 78 proceeding against the hospital and various hospital staff members, administrators and doctors seeking an injunction to restore his privileges. The court dismissed the petition for failure to exhaust administrative remedies.

[4]In August 2006, plaintiff filed a complaint with the PHC against the hospital pursuant to Public Health Law § 2801-b, claiming that his privileges were terminated for "interpersonal, departmental and political reasons." In May 2007, the PHC notified plaintiff that it did not credit the complaint and that it found that the hospital's "reasons for terminating your privileges were consistent with Public Health Law Section 2801-b (related to standards of patient care and patient welfare)." The parties have not raised the question whether the PHC determination has preclusive effect.

case, held that "assuming the doctrine of primary jurisdiction is inapplicable, I consider plaintiffs' claims on the merits and conclude that they are without merit" (*id* at 499).

In this action, plaintiff asserts claims for discrimination and retaliation under New York City Administrative Code § 8-107, alleging that his suspension and termination were motivated by bias against his and his patients' creed. Supreme Court granted defendants' motion to dismiss, concluding, based on the federal action, that this action was barred by res judicata. While the claims in the federal action and this action arise out of the same events and plaintiff could have asserted his current claims before the federal court (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357-358 [1981]), the federal dismissal does not operate as a bar here. That court's ruling on the merits does not have preclusive effect because its alternative ground for dismissal (primary jurisdiction) did not go to the merits, and standing alone, would not have res judicata effect (*see* Restatement [Second] of Judgments § 20, Comment e; *see also Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 199 [2008]). Moreover, if the alternative ground had been preclusive, plaintiff should not have been directed to go to the PHC.

Plaintiff's commencement of this action did not constitute "frivolous conduct" within the meaning of 22 NYCRR 130-1.1.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2512 The People of the State of New York, Ind. 1797/06
Respondent,

-against-

Ramon Correa,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered February 6, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him to concurrent terms of 2 years, unanimously affirmed.

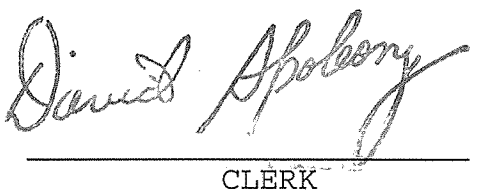
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. We do not find the undercover officer's account of the sale to be so implausible as to compel this Court, in its role as "thirteenth juror" (*id.* at 348), to reject it in favor of defendant's testimony.

Defendant did not preserve his challenge to the court's

response to a deadlock note from the jury, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The instruction was not coercive in any way (*see People v Ford*, 78 NY2d 878 [1991]), and it essentially told the jurors to maintain their conscientiously held beliefs, even if it omitted that precise formulation. Since the instruction was not constitutionally deficient, the absence of any objection by trial counsel did not deprive defendant of effective assistance.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010



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Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2539 The People of the State of New York, Ind. 2866/07
Respondent,

-against-

Jose Reyes,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for respondent.

Order, Supreme Court, New York County (James A. Yates, J.), entered on or about September 26, 2008, which adjudicated defendant a level three sex offender and sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Assuming, without deciding, that the state and federal standards for effective assistance at a criminal trial apply to a sex offender adjudication (*see People v Reid*, 59 AD3d 158 [2009], *lv denied* 12 NY3d 708 [2009]), we conclude that defendant received effective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). In the underlying criminal case, defendant had been indicted for multiple sex crimes against two children, but only pleaded guilty to one count of first-degree sexual abuse. In

adjudicating him a level three offender, the court, relying on the victims' grand jury testimony, assessed points relating to the counts to which defendant did not plead guilty. On appeal, defendant faults his counsel for failing to use, or affirmatively asking the hearing court to disregard, material that could have impeached the victims' grand jury testimony, including documents prepared during an investigation by the Administration for Children's Services. However, counsel could have reasonably concluded that, on the whole, the impeachment material was more damaging than helpful. In particular, the inconsistencies, especially as to dates of events, could be readily explained, and the materials generally supported the victims' allegations. In any event, regardless of whether counsel should have used these documents, his failure to do so could not have affected the sex offender adjudication or deprived defendant of a fair hearing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2541 Swenvest Corporation, Index 604033/06
Plaintiff-Appellant,

-against-

Stephen Wener, et al.,
Defendant-Respondents.

Cowan, Liebowitz & Latman, P.C., New York (J. Christopher Jensen of counsel), for appellant.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Sean M. Lipsky of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J., pursuant to CPLR 9002, upon a decision by Herman Cahn, J.), entered March 30, 2009, after a nonjury trial, dismissing the complaint, unanimously affirmed, with costs.

In this action to recover investment losses, the trial court's findings, which "rest[ed] in large measure on considerations relating to the credibility of the witnesses" (*Claridge Gardens v Menotti*, 160 AD2d 544, 545 [1990]), were based upon a fair interpretation of the evidence, which showed that the textile finishing plant and its holding company, in which plaintiff and defendants invested, were not fraudulently operated and controlled by defendants. Plaintiff failed to prove that the pricing and credit terms imposed on the plant's various customers were unreasonable and inured solely to the benefit of

other textile companies owned by defendants. The trial court also properly determined that the losses suffered by the plant were not a result of mismanagement or misuse, but were related to market forces.

We have considered plaintiff's remaining contentions and find them unavailing.

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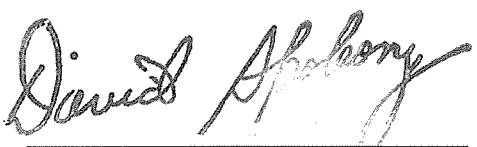

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Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2542-
2542A The People of the State of New York,
Respondent,

SCI 3205/06

-against-

Celio Verdugo,
Defendant-Appellant.

Vinoo P. Varghese, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at plea; Laura Ward, J. at sentence), rendered September 8, 2006, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 3 years, and order, same court (Patricia Nunez, J.), entered on or about March 4, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After a thorough evidentiary hearing, the court properly denied defendant's motion to vacate the judgment, made on the ground of ineffective assistance of counsel. There is no basis for disturbing the court's credibility determinations (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant received effective assistance in connection with his guilty plea (*see People v Ford*, 86 NY2d 397, 404 [1995]). The credible

evidence established that counsel provided competent advice concerning sentencing and immigration matters and the viability of an agency defense, and it establishes that defendant did not need an interpreter.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2543 Estate of Yaron Ungar, etc., et al., Index 102101/06
Plaintiffs-Appellants,

-against-

The Palestinian Authority,
Defendant,

The Palestinian Pension Fund for the
State Administrative Employees
in the Gaza Strip,
Defendant-Respondent.

Jaroslawicz & Jaros, New York (Robert J. Tolchin of counsel), for appellants.

Morrison & Foerster LLP, New York (Mark David McPherson of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 9, 2009, which denied plaintiffs' motion to shift the burden of proof and alter the order of presentation at trial, unanimously affirmed, with costs.

The Court reaches this decision by assuming, without deciding, that Supreme Court's order is appealable. Plaintiff

had the burden of proving the facts as alleged (*Lopp v Lopp*, 191 App Div 500 [1920]), even when there is a rebuttable presumption (*St. Andrassy v Mooney*, 262 NY 368, 371-372 [1933]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

David Apolony

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2544 The People of the State of New York, SCI 3222/08
Respondent,

-against-

Tommy Beal,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about October 17, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 15, 2010

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Andrias, J.P., McGuire, Moskowitz, DeGrasse, JJ.

2545-
2545A Roberta Schreiber Ulmer,
Plaintiff-Appellant,

Index 024388/88

-against-

Rosalie F. Winard, et al.,
Defendants-Respondents.

Guzov Ofsink, LLC, New York (David J. Kaplan of counsel), for appellant.

Arthur I. Winard, P.C., New York (Mark L. Rosenfeld of counsel), for Rosalie F. Winard and Edward Gershuny, respondents.

Hartman & Craven LLP, New York (Edward A. White of counsel), for Marvin Rosenblatt, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Richard S. Oelsner of counsel), for Joel Weissman and Esther Weissman, respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 10, 2009, which denied plaintiff's motion to restore the action as against defendants Marvin Rosenblatt and the Estate of Paul Weissman and granted defendants' cross motions to dismiss the action as against them, and order, same court and Justice, entered March 11, 2009, which denied plaintiff's motion to vacate an order, same court (Rolando T. Acosta, J.), entered October 2, 2007, inter alia, dismissing the complaint as against defendant Arthur I. Winard, unanimously affirmed, without costs.

In moving to restore her case to the pre-note of issue

calendar, approximately 17 years after it was marked "disposed," plaintiff failed to make either of the requisite showings: a reasonable excuse for her default in appearing at a conference and a meritorious cause of action (22 NYCRR 202.27; *Perez v New York City Hous. Auth.*, 47 AD3d 505 [2008]; *Lopez v Imperial Delivery Serv.*, 282 AD2d 190 [2001], *lv dismissed* 96 NY2d 937 [2001]).

We have considered plaintiff's remaining arguments, including her contention as to lack of jurisdiction, and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2546 The People of the State of New York, Ind. 6902/03
Respondent,

-against-

Theodore Barnes,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 26, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly exercised its discretion in determining that defendant's admitted violation of his plea agreement, by leaving a drug program without permission, disqualified him for the promised dismissal of the indictment. Defendant failed to preserve his claim that he was constitutionally entitled to a hearing (*see People v Barnes*, 46 AD3d 375 [2007], *lv denied* 10 NY3d 808 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court made a thorough inquiry, and there was no need

for a hearing (*see People v Fiammegta*, __NY3d__, 2010 NY Slip Op 01344, *5-*7 [Feb 16, 2010]). Even if, as defendant claimed, he left the program to take advantage of an employment opportunity, it remained undisputed that he left without permission and thus violated the plea agreement. The consequence of that violation was a discretionary determination for the court, and there was no factual issue upon which to hold an evidentiary hearing. Instead, the court "provided defendant with a reasonable opportunity to present his explanations for the violation" and properly rejected them (*People v Villaneuva*, 65 AD3d 939, 939 [2009], *lv denied* 13 NY3d 863 [2009]).

Defendant's excessive sentence claim is moot because he has been discharged from parole.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2548N In re United Services Automobile Association,
Petitioner-Respondent,

-against-

Max Kungel,
Respondent-Appellant.

Index 260394/08

Harold Chetrick, New York, for appellant.

Paul F. McAloon, New York, for respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered May 18, 2009, which granted respondent's motion to reargue a prior order, same court and Justice, entered February 26, 2009, denying his motion to dismiss the petition seeking to stay arbitration, and, upon reargument, adhered to the prior order, unanimously affirmed, without costs.

The court correctly held that CPLR 2001 (as amended by L 2007, ch 529), applied, giving it the discretion to permit petitioner to correct its procedural mistake in commencement of its proceeding to stay the arbitration demanded by respondent. Although petitioner erroneously served the petition and notice of petition on respondent one day prior to purchasing an index number and filing process with the court (*see* CPLR 304, 306-a, 306-b; *see also Harris v Niagara Falls Bd. of Educ.*, 6 NY3d 155,

158 [2006]; *Matter of Gershel v Porr*, 89 NY2d 327, 332 [1996]), the recent amendment to CPLR 2001 was enacted expressly "'to fully foreclose dismissal of actions for technical...non-prejudicial defects' in commencement . . . regardless of whether the defendant objected in a timely and proper manner" (*John M. Horvath, D.C., P.C. v Progressive Cas. Ins. Co.*, 24 Misc 3d 194, 200 [Dist Ct, Nassau County 2009], quoting 2007 Rep of Advisory Comm on Civ Prac, at 24-25, reprinted in 2007 McKinney's Session Laws of NY, at 2219)), so long as "the mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process" does not prejudice a substantial right of a party (CPLR 2001). Petitioner otherwise satisfied all statutory filing deadlines, and therefore its petition was timely (*see* CPLR 306-b; 7503[c]; *see also National Union Fire Ins. Co. v Hugee*, 173 Misc 2d 619, 620-22 [Sup Ct, NY County 1997]).

Respondent's contention that the procedural irregularities here deprived the court of personal jurisdiction over him has been waived as he failed to raise this argument until he submitted his reply in support of his motion for reargument (*see* CPLR 3211[e]; *see e.g. Matter of Ballard v HSBC Bank USA*, 6 NY3d 658, 664-65 [2006]). In any event, the record shows that respondent received notice of the petition to stay arbitration

through his attorney at the correct address one day prior to the proceeding being commenced in Supreme Court, and he has suffered no prejudice (*compare Parker v Mack*, 61 NY2d 114, 117-19 [1984]; *Matter of MRC Receivables Corp. v Taylor*, 57 AD3d 1000, 1001-02 [2008]; *Matter of Lamb v Mills*, 296 AD2d 697, 698-99 [2002], *lv denied* 99 NY2d 501 [2002]).

We have considered respondent's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2549N New York City Transit Authority, Index 400672/08
Plaintiff-Appellant,

-against-

Philbert Gorrick,
Defendant-Respondent.

Martin B. Schnabel, Brooklyn (Gena B. Usenheimer of counsel), for appellant.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered July 27, 2009, which, in an action seeking restitution of monies allegedly fraudulently obtained pursuant to an arbitration award in a disability discrimination action, inter alia, granted defendant's motion to stay the action and compel arbitration, unanimously reversed, on the law, without costs, the motion denied and the stay vacated.

The court erred in granting the motion to compel arbitration pursuant to a collective bargaining agreement between plaintiff, defendant's former employer, and defendant's former union, a non-party to this action. The sole issue in this action is whether defendant's admittedly fraudulent misrepresentation of earnings in an affidavit executed for the express purpose of inducing plaintiff to pay over $100,000 in back pay constitutes actionable fraud, an issue which does not require interpretation or

application of the collective bargaining agreement (*see John Wiley & Sons, Inc. v Livingston*, 376 US 543, 547 [1964] [whether or not a party is bound to arbitrate and the issues that must be arbitrated is determined by the contract between the parties]).

Defendant, as an employee, also has no rights under the collective bargaining agreement, to which only his former employer and union are parties, to unilaterally bring the issue to arbitration (*see Matter of Board of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508 [1987], *cert denied* 485 US 1034 [1988]; *Hickey v Hempstead Union Free School Dist.*, 36 AD3d 760, 761 [2007]; *Calka v Tobin Packing Co.*, 9 AD2d 820, 821 [1959]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

David Spolony

CLERK

Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

2550 In re Benjamin Santiago Ind. 3998/06
[M-845] Petitioner,

-against-

Hon. James Yates,
Respondent.

Benjamin Santiago, petitioner, pro se.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 15, 2010

David Spolony

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
John T. Buckley
James M. Catterson
Rolando T. Acosta
Helen E. Freedman, JJ.

1380
Index 106116/08

x

In re James Riches, et al.,
Petitioners-Appellants,

-against-

New York City Council, et al.,
Respondents-Respondents.

x

Petitioners appeal from an order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered July 24, 2008, which dismissed this proceeding for a summary judicial inquiry pursuant to New York City Charter § 1109.

Norman Siegel, New York, McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel), and Philip Van Buren, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman, Leonard Koerner, Spencer Fisher, and Stephen Kitzinger of counsel), for respondents.

FREEDMAN, J.

We affirm the motion court's dismissal of this matter as a proper exercise of discretion.

Eight citizens bring this proceeding, pursuant to Section 1109 of the New York City Charter, requesting that Supreme Court conduct a summary judicial inquiry concerning the City Council's practice of allocating funds to non-existent entities during its initial budgeting process. Section 1109 provides that upon application, a Supreme Court Justice may conduct an inquiry for the purpose of alerting the public to a "violation or neglect of duty" by government officials. The circumstances giving rise to this application arose when local newspapers, including the New York Post, the New York Times, and the Daily News, published the findings of an investigation conducted by the New York City Department of Investigation concerning allocation of funds by the City Council to fictitious organizations or entities, which respondents call "holding codes," for the purpose of making supplemental allocations to existing organizations.

The motion court made findings that the City Council's practice of holding funds in reserve for community programs had been in existence since 1988. During this time funds allocated to these reserve accounts were disbursed during the fiscal year through contracts with City agencies. Starting in 2001 and continuing through 2007, a total of $17.4 million had been budgeted that way, but instead of being put into reserve or

holding accounts, the funds were allocated to "holding codes" or fictitious organizations. City Council Speaker Christine Quinn announced that she had ordered this practice stopped in the spring of 2007, but when she discovered that it continued in the fall of 2007 in spite of her directive, she alerted investigators from the United States Attorney's Office and the New York City Department of Investigation. On April 15, 2008, a federal grand jury sitting in the Southern District of New York, after looking into the practice, returned an indictment against two staff members of a New York City Council member for conspiracy to commit mail fraud and conspiracy to commit money laundering in connection with an alleged scheme to embezzle money from a real organization, the Donna Reid Memorial Education Fund, to which the City Council had appropriated funds.

Petitioners contend that the practice of allocations to non-existent organizations, which has now been publicly disclosed and discontinued, constituted a violation or neglect of duty in relation to the property, government or affairs of the City of New York because it violated Charter § 100(c) which requires that the budget be itemized for each program, person or institution and be so described in the preliminary and final budget. According to petitioners, this practice also violated the City Council's duty as trustee of the property, funds and effects of the city as set forth in New York City Charter § 1110 and allowed the Speaker to broker agreements for future allocations.

Petitioners seek to examine Mayors Giuliani and Bloomberg, Speakers Vallone, Miller and Quinn, former City Council finance director Michael Koegh, deputy finance director Staci Emanuel, current Council Speaker chief of staff Charles Meara, special counsel to the Speaker Wayne Kwadler and Comptrollers William Thompson and Allan Hevesi to inquire of them concerning their knowledge of and acquiescence in the practice of allocating City Council funds to "fictitious" organizations for the purpose of making later allocations to needy organizations.

Section 1109 of the City Charter, under which petitioners make this request, states as follows:

> "A summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city *may be* conducted under an order to be made by any justice of the supreme court in the first, second or eleventh judicial district on application of the mayor, the comptroller, the public advocate, any five council members, the commissioner of investigation or any five citizens who are taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein have knowledge or information concerning such alleged violation or neglect of duty. Such inquiry shall be conducted before and shall be controlled by the the justice making the order or any other justice of the supreme court in the same district. Such justice *may* require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry. Any answers given by a witness in such inquiry shall not be used against such witness in any criminal proceeding, except that for all false answers on material points such witness shall be subject to prosecution for perjury. The examination shall be reduced to writing and shall be filed in the office of the clerk of such county within the first, second or eleventh judicial district as the justice may direct, and shall be a public record [emphasis added].

The dissent would find, for the first time since the passage

of the predecessor to section 1109 of the New York City Charter (section 1534 of the Greater New York Charter and later section 109 of the New York City Charter) in 1873, that a Supreme Court Justice's denial of that application was an abuse of discretion.

Respondents City Council and Speaker Quinn moved to dismiss the proceeding on the grounds that the purpose of the charter provision was to expose municipal corruption or closely related matters and that the dispute here is primarily political. They also contend that the underlying facts, namely the allocation of funds to fictitious organizations, are undisputed and have received extensive publicity. Respondents further contend that appropriate organs of government are addressing the matter, that the total amount involved for all of the seven years involved (2002-2008) amounted to just $17.4 million, and that the City Charter provision asking a judge to conduct such an inquiry is unconstitutional. Respondents aver that a summary inquiry would likely frustrate ongoing criminal investigations.

City respondents contend that the history of this Charter provision, originally enacted in 1873 as a special remedy in the reform charter and incorporated as Section 1534 into the Greater New York Charter, was designed to root out corruption after the Boss Tweed era and specified various acts including wrongful diversion or misapplication of funds, or betrayals of trust, as potential subjects of inquiry. The provision was restated in

1936 as section 1109 of the current City Charter in a more general statement namely, "alleged violation or neglect of duty."

The City maintains that the original purpose of and scope of the provision remains the same as it was before the language change. The purpose stated in the 1917 case of *Matter of Mitchel v Cropsey*, (177 *App Div* 663, 670 [1917]), was to expose corruption and wrongful diversion of funds, and not to investigate the propriety of legislative issues. City respondents insist that petitioners have not alleged that funds were actually misapplied, but merely that the budgeting process frustrated certain provisions of the City Charter. They contend that section 1109 was intended to be a vehicle for exposing more venal acts.

While petitioners contend that the 1936 language change stating "any alleged violation or neglect of duty" expanded the scope of inquiry beyond simply exposing corruption, they also argue that the current claims involving "misappropriation of funds" constitute corruption because it gave the Speaker the ability to control Council member votes by granting or withholding of funds to members' districts. Whether the post-1936 language expanded the scope of the provision, as petitioners claim, or is merely a reiteration of the original purpose, as the City and motion court argue, is not pertinent here because our

decision does not turn on an analysis of the change.

The City respondents also contend that the provision is flawed in that it assigns an unorthodox and unconstitutional role to Supreme Court Justices by imposing a "public trust" upon justices in violation of NY Constitution article VI, § 20(b)(1), which provides that a justice of the Supreme Court may not hold any other public office, with certain inapplicable exceptions. Section 1109 asks justices, based on simple affidavits, to engage in a non-justiciable procedure to create a public record without reaching any findings. The City claims that the justice then becomes an investigator or commissioner and is thrust into a political role or a role that belongs to another branch of government. Respondents invoke *Matter of Richardson* (247 NY 401 [1928]), wherein the Court of Appeals found that a statute allowing the Governor to use a Supreme Court Justice as a "standing commissioner" to investigate charges against public officials was unconstitutional because it imposed another "public trust" (*id.* at 419).

While several courts have addressed the issue of section 1109's constitutionality, and no court has found it to be unconstitutional,[1] that too is not the basis for our determination

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[1] In *Mitchel v Cropsey* (177 App Div 663 [1917], *supra)*, and most recently in *Matter Green v Giuliani* (187 Misc 2d 138 [2000]), courts have upheld the constitutionality of the charter provision. In *Mitchel,* the Second Department found that section 1534 was generally constitutional even though it conferred non-judicial functions upon Supreme Court Justices, but it also

here.

The parties agree that, before the current matter, twelve applications were made pursuant to section 1109 or its predecessors. It appears that the inquiry only went forward in one case, *Matter of Leich* (31 Misc 671 [Sup Ct, NY County 1900]). With the exception of *Leich*, and *Matter of Green v Giuliani* (187 Misc 2d 138 [2000]), in the other reported cases, either the nisi prius court or the appellate court found that proper exercise of discretion mandated dismissal of the application. For example, in *Matter of Greenfield v Quill* (189 Misc 91 [1946]), the court

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found that it could not be used to infringe upon the legislative functions or for citizens to investigate the propriety or wisdom of legislative questions. That case attempted to challenge the wisdom of a contract that the Board of Estimate entered into in behalf of the City of New York with the New York Central Railroad Company that would alienate lands belonging to the City.

In *Green*, the trial court granted an application by the Public Advocate pursuant to section 1109 for an inquiry concerning the source of information that the Mayor disclosed in public statements about an individual shot by a police officer. The petitioners claimed that the Mayor had obtained the information concerning the victim from court records that had been sealed and should not have been made available. The court found that the question of how the information had been obtained had not been answered and, relying on *Mitchel*, and *Matter of Davies* (168 NY 89 [1901]), upheld the constitutionality of the provision as applied to matters involving a judicial purpose (187 Misc 2d at 142-143). The court proceeded to describe other judicial functions that were not of a determinative nature, such as presiding over a grand jury investigation. That decision was not appealed and the issue that was the subject matter of the inquiry was resolved without the inquiry going forward. Similarly in *Matter of Leich* (31 Misc 671 [1900]), a trial court upheld the constitutionality of section 1534, finding that the immunity conferred was adequate, and ordered public officials to testify.

declined to conduct an inquiry concerning whether the respondent could at the same time receive a salary as a councilman and receive a salary and expenses as an officer of the Transport Workers Union, since the court had no power to oust a council member and the fact of the two salaries was known. In *Matter of Larkin v Booth* (33 AD2d 542 [1969]), this Court specifically questioned whether the denial of an ex parte application made under section 1109 was even appealable, but went on to determine that since there was no factual dispute concerning the making of a contract between the New York City Commission on Human Rights and the Metropolitan Life Insurance Company as landlord, the court did not abuse its discretion in denying the application (*see also Matter of Larkin,* 58 Misc 2d 206 [1968] [holding that whether to grant order for a summary inquiry is purely within the discretion of the court]; *Matter of City of New York [Seligman]*, 179 Misc 505, 511 [1942] [holding that a summary inquiry was a "matter of sound judicial discretion"]). The court in *Seligman* was asked to inquire into the private use by city officials and public employees of property owned by the City of New York, but found that such inquiry was unnecessary because two extensive investigations had been undertaken, one by the New York City Commissioner of Investigation and one by a Bronx County grand jury.

It is clear that the charter provision's use of the word "*may*" when it states that a "summary inquiry . . . may be

conducted . . . by a justice of the supreme court" gives the Supreme Court Justice discretion to determine when such an inquiry is called for or appropriate. Implicit in the use of "*may*" is that the court has such discretion. As noted above, in *Matter of Larkin v Booth,* (33 AD2d 542 [1969], *supra*) this Court questioned whether denial of an application made pursuant to section 1109 is even appealable. Where as here, a Supreme Court Justice declines to conduct such an inquiry and articulates reasons for refusing to do so, the decision should not be reviewed except in a case where there is a clear abuse of discretion.

The Supreme Court Justice here furnished several legitimate reasons for denying the application. First, the practice of reserving funds in the name of non-existent organizations had been acknowledged and had received extensive publicity. Second, as did the court in *Seligman* (179 Misc at 510-511), the court found that the ongoing investigation of the practice by two governmental agencies was sufficient to safeguard the public interest. The court also found that the practice of reserving funds was not the type of transgression that the charter provision was designed to address (*see Mitchel*, 177 App Div at 670).

Because the Southern District investigation was ongoing, the United States Attorney had sought to intervene here to seek a 90-day stay of any inquiry until its work was done. Respondents did

not oppose a stay, but since it was exercising its discretion to deny the inquiry, the motion court found it unnecessary to decide that issue.

The dissent, while acknowledging that there were other ongoing investigations, opines that those investigations have not answered all of the questions that petitioners wanted to pose to the various witnesses. The dissent also avers that the other investigations do not guarantee the type of exposure that this inquiry would feature. The allegedly unanswered questions include which individuals knew about the practice, when the information became available, and whose influence determined where the $17 million over the seven-year period actually went. Petitioners also want a sworn statement that the practice has ceased. However, it is not clear what purpose would be served at this time in requiring sworn testimony from a host of past city officials about prior allocations of a small percentage of funds to legitimate community organizations. Such an inquiry would only be a source of unnecessary publicity and likely involve undue interference with the City Council's prerogative of maintaining responsibility for its own budget.

For the foregoing reasons, we affirm on the basis that the Supreme Court exercised its discretion appropriately in denying the application for a summary inquiry.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Joan B. Lobis, J.), entered July 24, 2008, dismissing this proceeding for a summary judicial inquiry pursuant to New York City Charter § 1109, should be affirmed, without costs.

All concur except Catterson and Acosta, JJ.
who dissent in an Opinion by Catterson, J.

CATTERSON, J. (dissenting)

Because I believe that the majority has chosen to ignore allegations of misfeasance involving the allocation of more than $17,000,000 in municipal funds to a "slush fund," as well as more than a century of law, I respectfully dissent. New York City Charter § 1109 provides for a summary judicial inquiry at the behest of citizen taxpayers of the City of New York. It is unique in its scope and exists solely to shine the light of public scrutiny on the actions of public officials. For the reasons that follow, I find that it is abundantly clear that section 1109 is not limited to allegations of official corruption, and the tide of current events requires just such an inquiry.[1]

The petitioners - eight citizen-taxpayers from all five boroughs of New York City - brought the instant proceeding, seeking a summary inquiry into respondent New York City Council's practice of making appropriations to fictitious organizations from 2001 through 2007. Approximately $17.4 million was so appropriated.

Relying on newspaper articles, the petitioners alleged:

> "Upon information and belief, the funds appropriated to fictitious entities were later used at

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[1]As recently as February 9, 2010, the United States Attorney for the Southern District of New York obtained an indictment against a City Council member on charges stemming from the investigation into the allocation of the funds at issue here, which the media popularly characterize as a "slush" fund.

the Council Speaker's discretion to reward groups that were loyal to her, to reward politically important allies and cooperative council members, and to fund favored council members' favored projects...

"Upon information and belief, the grant or withholding of appropriations to grantees of an individual council member's choosing ... are used as a means of controlling how individual council members vote...

"Upon information and belief, at least one of the groups ultimately funded through the Practice used funds for political purposes... Upon information and belief, the Donna Reid Education Fund allegedly used $21,000 in City Council funds for political fliers and a hall used for events for a political club... The Donna Reid fund received approximately $14,000 from the City Council accounts of the fictitious New York Foundation for Community Development and American Association of Concerned Veterans."

The petition alleged the following violations:

"The New York City Council, from 2001 through 2007, violated New York City Charter § 100(c) ... Under Charter § 100(c) the budget must be itemized for each program, purpose, activity or institution ... Itemization to a non-existent grantee is not an itemization to any particular program, purpose, activity or institution.

"[By engaging in the Practice,] the New York City Council violated the intent and frustrated the statutory scheme of City Charter § 100-105 and § 225-§ 258 to create a unified, accountable annual budgeting process...

"The New York City Council violated its duty as a trustee of the property, funds and effects of [the] city under New York City Charter § 1110... Making appropriations to non-existent entities... constitutes a waste of public funds in so far as the additional appropriations require taxation in excess of the actual foreseen and declared cost of the services and... items to be obtained."

The petition suggested specific questions that should be

asked in the inquiry, and that a summary inquiry was not duplicative or superfluous:

> "Petitioners are aware that the matter has been referred to the United States Attorney for the Southern District and the New York City Department of Investigation. Such referrals, however, do not ensure that the full facts ... will come to public light. Facts discovered in the office of the United States Attorney are not made public when there is no criminal indictment or more broadly than the facts necessary for such indictment. Similarly, findings of the New York City Department of Investigations that do not result in Formal Disciplinary Proceedings are not reported to the public. In the event of Informal Proceedings, the record or result of the DOI's investigation is expunged."

The respondents (the New York City Council and Christine Quinn) moved to dismiss the petition pursuant to CPLR 3211. Additionally, the United States Attorney moved to intervene and, "if the . . . petition . . . is . . . not dismissed before testimony is taken, staying for an initial period of 90 days any testimony that would confer any form of immunity on any witness." The petitioners did not oppose the motion to intervene.

The motion court denied the petition and dismissed the proceeding, finding that "a summary inquiry is not warranted under the nature of the allegations in the petition." The court stated, "The matter at issue has already received substantial publicity and press coverage. The practice has allegedly stopped and investigations by governmental agencies are underway ... The primary purpose of the summary inquiry [i.e., to expose corruption] ... is not met here." I believe that this was error on several levels.

As a threshold issue, I agree with the petitioners' contention that New York City Charter § 1109 is not limited to inquiries into allegations of official corruption. Seemingly the majority does not dispute that by its plain terms, section 1109 simply is not so limited; it applies to "any alleged violation or neglect of duty in relation to the property, government or affairs of the city." Most recently, it has been used to challenge the disclosure of information from a sealed juvenile criminal record. Matter of Green v. Giuliani, 187 Misc.2d 138, 721 N.Y.S.2d 461 (N.Y. Sup. Ct. 2000).

The motion court improperly limited the scope of section 1109. In support of that view, the court relied on Matter of Mitchel v. Cropsey (177 App Div 663, 164 N.Y.S. 336 (1917))[2], wherein the Second Department noted that the predecessor of section 1109, then Greater New York Charter § 1534, was enacted in 1873, at a time of "corruption of city officials and the looting of the city treasury by the so-called Tweed ring." Id., at 670, 164 N.Y.S. at 341. In Mitchel, the court held that pursuant to its very terms, section 1534 "was intended to expose the acts of corruption and raids on the city treasury, then believed to be prevalent." Id.

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[2]Mitchel was argued for the City of New York by Charles Evans Hughes (an alumnus of what is now Colgate University) following his tenure as an Associate Justice of the United States Supreme Court and his failed presidential bid against Woodrow Wilson in 1916. Of course, 13 years later he became Chief Justice of the Court.

Mitchel does not support the respondents' position or the motion court's analysis for two reasons. First, contrary to the respondents' view, the Mitchel Court did not dismiss the petition on the ground that it did not involve allegations of corruption. Rather, the petition in Mitchel alleged that the New York City Board of Estimate and Apportionment was *about* to enter into a contract with a railroad company. Id., at 670, 164 N.Y.S. at 341. The Second Department held that, "there can be no diversion of funds, no violation of statute nor delinquency until the board has acted." Id. at 671, 164 N.Y.S. at 342. The court pointed out that "[t]he proposed contract may never be carried out." Id. Furthermore,

> "[i]t would be intolerable if, in respect to every pending proposition before the board of estimate and apportionment, from building a subway or bridge to acquiring land for a schoolhouse, all the heads of departments of the City could be haled into court and cross-examined by disaffected tax-payers, or even by some other hostile official, with no result except publicity." Id. at 672, 164 N.Y.S. at 343.

Thus, the sole ground for dismissal was that any petition for inquiry was entirely premature when no official action had actually taken place.

Second, the statute at the time of Mitchel was worded differently than it is today; then section 1534 provided that:

> "the examination shall be confined to an inquiry into any alleged wrongful diversion or misapplication of any moneys or fund, or any violation of the provisions of law, qualification or neglect of duty of inspectors, or delinquency charged in the affidavit touching the office or the discharge or neglect of duty." Id. at 666,

164 N.Y.S. at 338 (emphasis added); see also Green, 187 Misc.2d at 149-150, 721 N.Y.S.2d at 470-471.

The respondents claim that "[i]n reviewing the scope of Charter § 1109, it is appropriate to construe it 'as the courts would have construed it if it had come in question soon after its passage.' People v. Broadway Railroad Company, 126 N.Y. 29, 37, 26 N.E. 961, 963 (1891); McKinney's Statutes § 93." When viewed in the historical context, it would be folly to construe section 1109 in the same fashion as its 1873 predecessor when the provision has been amended substantively since 1873. See, e.g., Matter of Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 103, 667 N.Y.S.2d 327, 329 689 N.E.2d 1373, 1375 (1997) (amendment is meant to effect some change in existing law); McKinney's Consolidated Laws of NY, Book 1, Statutes § 93. Indeed, People v. Broadway R.R. Co. of Brooklyn (126 N.Y. 29) quoted by the respondents did not involve a subsequent amendment to a statute.

The respondents' reference to McKinney's Consolidated Laws of NY, Book 1, Statutes § 93 is also inapposite to their argument; that section says, "Generally, a statute speaks, not from the time when it was enacted, or when the courts are called on to interpret it, but as of the time it took effect." First, "[i]t is a fundamental tenet of statutory construction that every word in a statute is to be given effect. McKinney's Cons Laws of NY, Book 1, Statutes § 231. Limiting the summary inquiry provision to allegations of financial corruption would . . . do violence to

that basic principle of statutory construction." Green, 187 Misc.2d at 150, 721 N.Y.S.2d at 471.

Second, even were we to construe section 1109 in the same fashion as its nineteenth century analog, the respondents' interpretation is nonetheless wrong. If the Legislature's sole purpose had been to expose acts of corruption or misapplication of funds, the predecessor to section 1109 would not have specifically included within its scope inquiries not involving corruption; namely, "want of mechanical qualification for any inspectorship of public work." Green, 187 Misc.2d at 149, 721 N.Y.S.2d at 470.

It is true that, even after section 1109 was amended to delete any reference to wrongful diversion of money, a court stated:

> "the sole legislative purpose in the enactment of section 1109 was to bring acts of corruption to the public's attention by an investigation that thereafter 'shall be a public record' (see Matter of Greenfield v. Quill, 189 Misc. 91, 68 N.Y.S.2d 104 (N.Y. Sup Ct. 1946); Matter of City of New York [Seligman], 179 Misc. 505 (N.Y. Sup. Ct. 1942); and Application of Rolnick, et al., 69 N.Y.S.2d 13 (N.Y.Sup. Ct. 1946))." Matter of Moskowitz (Lindsay), NYLJ, July 7, 1970, at 10, col 6 (N.Y. Sup. Ct. 1970).

It is clear that to the extent Moskowitz could be read to support the respondents' position, it was wrongly decided and should not be followed. None of the cases cited by Moskowitz stand for the proposition that section 1109 or its predecessors were limited to allegations of corruption. Greenfield found

there was no need for a summary inquiry because there was "no material issue as to the facts." 189 Misc. at 96, 68 N.Y.S.2d at 108. Seligman denied an application for a summary inquiry because the issue had already been thoroughly covered by: the Commissioner of Investigation (who submitted reports with 1518 pages of testimony); a grand jury (which heard 85 witnesses and received 203 exhibits); and the President of the Civil Service Commission (whose investigation involved 648 pages of testimony). 179 Misc at 505-508, 510, 39 N.Y.S.2d at 506-508. Rolnick denied the application because there was nothing in the predecessor to section 1109 which allowed the court "to oust a public officer or to declare his office vacant." 69 N.Y.S.2d at 13.

The respondents contend that New York City Charter § 1109 is analogous to General Municipal Law § 51. However, the respondents do not cite any case under section 1109 or its predecessors that looked to General Municipal Law § 51. Even were we to apply a General Municipal Law § 51 analysis, it would not bar the instant petition. The petitioners do not seek injunctive relief, nor have they alleged waste. Furthermore, on a CPLR 3211 motion to dismiss, where all inferences are drawn in favor of the non-movant, one can certainly infer that the practice which the petitioners seek to expose to the light of public inquiry is capable of mischief to the public fisc, a fact that the majority chooses to ignore.

The respondents claim that if section 1109 is not limited to

allegations of corruption, municipal government could be paralyzed "on nothing more than a whim." This is simply and conclusively refuted by the historical record of such proceedings. Indeed, in the 137 years since 1873, there have been only 13 reported requests for a summary judicial inquiry,[3] most of which have been denied. As the first case interpreting section 1109's predecessor stated, "If it be said that [the statute] enables the citizen to be meddlesome, the answer is that purity and integrity in government can be obtained and preserved only by the wholesome vigilance and meddlesomeness of the citizen." Leich, 31 Misc at 672. The history of such proceedings demonstrates that while the

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[3] In chronological order, they are Matter of Leich, 31 Misc. 671, 65 N.Y.S. 3 (N.Y. Sup. Ct. 1900) (declaring predecessor of section 1109 constitutional and ordering testimony to be taken); Mitchel, Seligman, Rolnick, and Greenfield (all discussed above); Lium v. Board of Election, 93 N.Y.S.2d 860 (N.Y. Sup. Ct. 1948)(holding that predecessor of section 1109 did not allow court to enjoin respondent from including a certain individual on the ballot); Matter of City of New York, NYLJ, Feb. 5, 1964, at 14, col 1 (N.Y. Sup. Ct. 1964) (eyesore not enough to warrant summary inquiry); Matter of Larkin, 58 Misc.2d 206, 295 N.Y.S.2d 113 (N.Y. Sup. Ct. 1968) (no need for summary inquiry because there was no dispute as to material facts); In re Anderson, NYLJ, Oct. 28, 1969, at 2, col 1 (N.Y. Sup. Ct. 1969) (denying application for summary inquiry where respondents did not have unconditional duty to make repairs); Moskowitz did not empower court to investigate implementation of local law re: narcotics); Jones v. Beame, 86 Misc.2d 832, 382 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1976), rev'd, 56 A.D.2d 778, 392 N.Y.S.2d 444 (1st Dept. 1977) (about standing to sue in general, not specifically related to section 1109), aff'd, 45 N.Y.2d 402, 408 N.Y.S.2d 449, 380 N.E.2d 277 (1978); Matter of Goldstein (Dryfoos), NYLJ, Jan. 13, 1983, at 11, col 5 (N.Y. Sup. Ct. 1983) (summary inquiry denied where some of allegations were not related to respondent's acts as a City Councilman, and the papers filed with the court constituted an adequate record as to remaining allegations); and Green 187 Misc.2d 138 (granting application for summary inquiry).

inquiries may be "meddlesome," they are nonetheless rare.

Even if I assumed that allegations of corruption were necessary, the petition contains such allegations. For example, the petition points out that some of the money allocated to fictitious organizations was subsequently disbursed to the Donna Reid Education Fund. In turn, the Donna Reid Fund used some of that money "for political fliers and a hall used for events for a political club that ... was controlled by" the Councilman who directed money toward the Donna Reid Fund in the first place.

The respondents relying on NY Constitution article VI, § 20[b][1]) contend that section 1109 is unconstitutional on its face because it violates the prohibition against a justice holding any other public office or trust. They also contend that section 1109 is unconstitutional as applied because it (a) violates the principle of separation of powers and (b) calls on the court to engage in fact-finding in a non-justiciable controversy. We categorically reject these contentions.

"[E]nactments of the Legislature . . . are presumed to be constitutional; those who challenge statutes bear a heavy burden of proving unconstitutionality beyond a reasonable doubt." City of New York v. State of New York, 76 N.Y.2d 479, 485, 561 N.Y.S.2d 154, 156, 562 N.E.2d 118, 120 (1990).

The argument that section 1109 or its predecessor confers non-judicial functions on justices of the Supreme Court or violates the separation of powers has previously been rejected. The

Court's reasoning in Mitchel is particularly instructive:

> "A purely legislative or executive function cannot be cast on the courts, for that would violate the provisions of the Constitution vesting the legislative power in the Senate and Assembly and the executive power in the Governor. But this line of demarcation has never been so artificially drawn as to prevent assignment to the justices of this court of duties which relate to their general powers, or which call for the exercise of judgment or of that peculiar knowledge and skill which are the result of judicial experience. Many duties of this character are exercised by justices of the Supreme Court and judges of the County Court, instances of which are acknowledgments of deeds, adoption of children, appointment of commissioners of condemnation, approval of certificates of incorporation, guardianship of children and of the insane. A justice who acts under section 1534 of the charter is called upon to exercise functions much more nearly approaching the judicial. He must determine whether the affidavit makes out a case under the statute; he must decide upon the relevancy of the evidence to the charges contained in the affidavit, and finally, in aid of the examination, he may punish for contempt - a power essentially judicial.
>
> "Although this proceeding itself cannot be called a judicial one, yet judicial methods are used, and judicial powers incidentally invoked; and, bearing in mind the duty of the courts to sustain acts of the Legislature, if by any reasonable interpretation that can be done, I am led to the conclusion that the act casting on the justices of this court the power to order such examination does not violate either the letter or the spirit of the Constitution." 177 App Div at 668-669, 164 N.Y.S. at 340-341; see Leich, 31 Misc. at 672-673, 65 N.Y.S. at 3-5.

Section 1109 poses no different constitutional question than its predecessor, and the Mitchel court's reasoning guides our conclusion here.[4]

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[4]I recognize that Matter of Richardson (247 N.Y. 401, 160 N.E. 655 (1928)), post-dates Mitchel and Leich. However, Richardson is inapposite. It involved a different statute

Contrary to the respondents' argument, Jones v. Beame (45 N.Y.2d 402, 408 N.Y.S.2d 449, 380 N.E.2d 277 (1978)), does not hold that section 1109 violates separation of powers. In Jones, section 1109 was the last of 11 causes of action. See 86 Misc.2d at 833, 382 N.Y.S.2d at 1007. Other causes of action sought, among other things, judgments "declaring that conditions in the city zoos constitute cruelty to animals" and "waste of municipal assets," "an injunction restraining sale of animals from the city zoos, the closing of those zoos, and the compulsory transfer of all animals to the Bronx Zoo." Id. Under those circumstances, the Court of Appeals understandably stated that "the plaintiffs would embroil the courts in the administration of programs the primary responsibility for which lies in the executive branch of government." 45 N.Y.2d at 406, 408 N.Y.S.2d at 450, 380 N.E.2d at 278. Further, the Court noted that the case involved "allocation of resources and priorities inappropriate for resolution in the judicial arena." 45 N.Y.2d at 407, 408 N.Y.S.2d at 451 (internal quotation marks and citation omitted). By contrast, in the instant case, the petitioners request only a summary inquiry;

(Public Officers Law § 34), pursuant to which the Governor directed a justice of the Supreme Court to conduct an investigation. 247 N.Y. at 405, 408-09, 160 N.E. at 656-657. See Green, 187 Misc.2d at 145, 721 N.Y.S.2d at 467 ("[i]n contrast to the statute challenged in Richardson, under the summary inquiry provision, the Justice of the Supreme Court is not made the delegate of the Governor, or of any other executive official. Nor does section 1109 make her a prosecutor, with an investigatory staff of her own"); see also Seligman, 179 Misc., at 511, 39 N.Y.S.2d at 508.

such an inquiry would neither embroil the courts in administration nor involve allocation of resources.

Notably, section 1109 does not "call[] on the court to engage in fact-finding." The statute merely requires "[t]he examination [of witnesses to] be reduced to writing and . . . filed in the office of the clerk."

The respondents' argument that this matter involves a non-justiciable political question has previously been rejected. See Green, 187 Misc. 2d at 148, 721 N.Y.S.2d at 470 ("[t]hat a case may have political overtones, involve public policy, or implicate some seemingly internal affairs of the executive or legislative branches does not . . . render the matter non-justiciable") (internal quotation marks and citations omitted). The court presiding over a summary inquiry does not decide a political question; as previously noted, it does not reach a conclusion.

The respondents' argument that section 1109 calls for an advisory opinion has also previously been rejected. See id. (since section 1109 does not provide for "a decision or opinion by the court," it "does not call for an advisory opinion").

The only real point of departure with my colleagues in the majority is their inexplicable view that it is "not clear what purpose would be served at this time in requiring sworn testimony from a host of past city officials about prior allocations of a small percentage of funds to legitimate community organizations." I categorically reject the notion that $17 million dollars is a

small amount of funds not worthy of notice. Furthermore, the allegations of the petition serve to question not only the appropriation, but also the very existence of the groups who were the alleged recipients.

Finally, the majority concludes its refusal to allow the charter-based inquiry on the astonishing statement that "[s]uch an inquiry would only be a source of unnecessary publicity and likely involve undue interference with the City Council's prerogative of maintaining responsibility for its own budget." The majority clearly has chosen to disregard the admonition of United States Supreme Court Justice Brandeis that, "sunshine is said to be the best of disinfectants." Louis D. Brandeis, Other People's Money and How The Bankers Use It (Fredericks A. Stokes Co. 1914). In my view, the record of disbursements at issue firmly demonstrates that publicity attendant to the Council's actions is far from the majority's characterization as "unnecessary." Furthermore, the City Charter provides for exactly the type of "influence" over the Council's actions that the majority is seeking to actively prevent.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2010

CLERK